**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 23 December 2002**

CASE NO.: 2002-LHC-1470

OWCP No.: 5-100156

In the Matter Of

ALONZA D. ALEXANDER,
Claimant

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK CO.,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

APPEARANCES:

Gregory Camden, Esquire
For the Claimant

Benjamin M. Mason, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

## DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq*., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas,

resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits. See 33 U.S.C. § 905(a).

## PROCEDURAL HISTORY[1]

The claimant seeks an increase in the degree of permanent partial disability benefits from ten to thirty percent, for a right knee injury sustained on June 7, 1996. On March 21, 2002, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me in June 2002.

A formal hearing was held before the undersigned on July 8, 2002, in Newport News, Virginia, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, Office of Workers' Compensation Programs ("OWCP"). Administrative Law Judge Exhibit (ALJ) I, Claimant's Exhibits (CX) 1- 4 and Employer's Exhibits (EX) 1- 4 were admitted to the record without objection. The record remained open post hearing for the submission of closing briefs.

## I. STIPULATIONS[2]

The parties stipulate and I find:

A. The claimant and employer are covered by the Act which applies to this proceeding.

B. The claimant and the employer were in an employee-employer relationship at the relevant times.

C. The claimant sustained an injury, on June 7, 1996, to his right leg.

D. The injury occurred in the course and scope of the claimant's employment.

E. The claimant provided timely notice of his injury to the employer.

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[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; "IX" for a Carrier's exhibit; "Dep." for deposition followed by the page number; and, "EX" for an Employer's exhibit.

[2] The private parties cannot bind the Special Fund absent the Director's agreement to the stipulations. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985) *cited with approval in Gupton v. Newport News Ship Building and Dry Dock*, 33 BRBS 94 (1999). Stipulations affecting the Special Fund may be accepted if there is evidence of record to support them. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000)(proper to accept stipulation involving non-party) *citing McDougal v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part sub. nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT)(( 9th Cir. 1993).

F. The claimant's claim for compensation was timely filed.

G. The employer filed a timely First Report of Injury and a timely notice of controversion.

H. The claimant's average weekly wage ("AWW") at the time of the injury was $ 581.33 resulting in a compensation rate of $387.55.

I. The claimant received temporary partial and temporary total disability benefits from the employer, voluntarily and without an award, at a rate of $387.55 per week, as follows:

PAID:

| Type of disability | From | To | # weeks | Amt Pd /Week | Total |
|---|---|---|---|---|---|
| Temp Partial | 5/22/97 | 9/10/97 | 16 | 274.22 | 4387.52 |
| Temp Partial | 9/19/97 | 9/23/97 | 5/7 | 274.22 | 195.88 |
| Temp Partial | 9/25/97 | 01/04/98 | 14 4/7 | 274.22 | 3995.78 |
| Temp Total | 01/05/98 | 08/05/01 | 187 | 387.55 | 72471.85 |
| Temp Partial | 08/06/01 | 11/11/01 | 14 | 174.22 | 2439.08 |
| | | | | Total | 83490.11 |

SHOULD HAVE PAID:

| | | | | | |
|---|---|---|---|---|---|
| Temp Partial | 5/22/97 | 9/10/97 | 16 | 274.22 | 4387.52 |
| Temp Partial | 9/19/97 | 9/23/97 | 5/7 | 274.22 | 195.88 |
| Temp Partial | 9/25/97 | 01/04/98 | 14 4/7 | 274.22 | 3995.78 |
| Temp Total | 01/05/98 | 08/05/01 | 187 | 387.55 | 72471.85 |
| | | | | Total | 81051.03 |
| | | | | Overpayment | 2,439.08 |

| | |
|---|---|
| Balance of previous payments | 4,197.55 |
| Total Overpayments | $ 6,636.63 |

X. The claimant is entitled to all payments above (listed in ALJ I with attached LS-208, dated 11/21/01) and the judge may enter an award for those payments.

## II. ISSUE

Whether the extent of the claimant's permanent partial disability is 10 percent or thirty percent?

## III. FINDINGS OF FACT

### A. BACKGROUND

The claimant is thirty-eight years old and is a resident of Chesapeake, Virginia. He worked for the employer for eighteen years as a welder. His job involved climbing, squatting, kneeling, going through tanks, and lifting heavy tool bags up and down ladders. On June 7, 1996, the claimant, while working as a welder at the employer's shipyard, sustained an injury to his right leg. Dr. Thomas Stiles, the claimant's treating physician, performed surgery which resulted in infection as a complication. It was subsequently determined that due to his work restrictions, the claimant could not return to his work with the employer. He left the shipyard in May 1997. (TR 16). He successfully completed a Department of Labor vocational rehabilitation program and found employment outside of the shipyard. He continues in that new employment. Dr. Stiles rated the disability at 30% whereas Dr. Apostoles, the employer's clinic physician, rated it at 10%. Dr. Apostoles utilized the *AMA Guides to the Evaluation of Permanent Impairment* in reaching his rating. He measured a 3 millimeter (mm) space between the bones in the knee on an X-ray, which results in a 7% impairment per the Guides and added an additional 3% for the consequences of the post-surgical staff infection.

### B. CLAIMANT'S MEDICAL EVIDENCE

#### *Claimant's Testimony*

The claimant injured his right knee on June 7, 1996, while working as a welder on the fourth deck of the U.S.S. Harry S. Truman. As he climbed nearly vertical shipboard stairs he hit the edge of his right knee. He re-injured the same knee two weeks later. (TR 17). The employer's clinic referred him to Dr. Stiles. He continued working either full or light duty until January 5, 1998. (TR 17). Dr. Stiles performed right knee surgery in May 1997. (TR 18). In January 1998, he was released from the shipyard due to work restrictions and has not returned since. (TR 19). He suffered a staff infection from the surgery which caused high fever, a lot of swelling, and his right knee has not been the same since. (TR 19). As a result, he took antibiotics for six months. Dr. Schaffer was his infectious disease doctor. Mr. Alexander took the DOL rehabilitation program and successfully completed it. He obtained a degree in information technology and now works for Smart Technology, in Fairfax, Virginia. (TR 19). He began work there as a network administrator, in August 2001. (TR 24). It is a "sit-down" job that does not require climbing ladders. He goes from one desk top (computer) to another.

Mr. Alexander still has problems squatting, crawling, kneeling and does not try to climb vertical ladders. When it is raining or cold, he has swelling. He has "a lot of pain in the back of my (his) knee. But, . . .ignore(s) it . . . until the pain becomes excruciating like it was then." (TR 21). He saw Dr. Stiles again, in May 2002, for problems with his knee. (TR 22).

*Office Records*

The claimant saw Dr. Stiles about his right knee many times, in 1997, both pre-operatively and post-operatively. (EX 4). Initially, Dr. Stiles thought he had suffered a contusion of the right knee with the possibility of an undisplaced patella fracture which had healed. (EX 4(a)). An X-ray reading of 7/31/97 by Dr. Stiles revealed there was no great difference between the mild osteoporosis of the left and right knees. (EX 4(i)). In a post-surgical office note, dated 10-14-97, Dr. Stiles wrote, "I see no reason, that he could not work that job (welder) without climbing." (CX 2-2). On 12-9-97 Dr. Stiles looked at X-rays from the shipyard which showed some osteoporosis of the right patella and some osteoporosis of the right upper tibia and right femoral condyle as compared to the opposite side, but no destructive changes. (CX 2-4). On 4-7-98, he had crepitation and clicking of the right knee with flexion and extension representing either change in the medial meniscus or medial femoral condyle secondary to internal derangement or infection. (CX 2-5). A 5-5-98 review of his MRI revealed some scar tissue and an intrameniscal signal posterior horn of the medial meniscus but no evidence of any condylar damage. (CX 2-6). On 10-6-98, he reported occasional pain and swelling to Dr. Stiles. (CX 2-8). On 1-5-99, he reported pain posteriorly in the upper calf area. (CX 2-9). Dr. Harry Allen read an MRI of 1/7/99 finding: "No evidence of meniscal tear. No evidence of acute ligamentous injury. Mild tricompartmental hypertrophic degenerative changes. Very small popliteal synovial cyst. Stable findings in comparison the prior study of 4/13/98." (CX 2-10). On 2/10/99, Dr. Stiles reported his X-rays showed a narrowing of both the medial femoral and medial tibial components to approximately 2 mm. On March 1, 1999, Dr. Stiles wrote:

> It is my opinion that he has a 30% permanent disability of his right lower extremity. This is based on his posttraumatic arthritis with his loss of cartilage in both his patella femoral and tibial femoral spaces. It is also based on his chronic recurrent swelling and discomfort.

(CX 2-12). On May 26, 1999, he had reports of recurrent discomfort, cramping and swelling. Dr. Stiles found a good range of motion with mild effusion and some obvious wasting of his right quadriceps. (CX 2-13). In August 1999, Dr. Stiles reported continuing use of Celebrex. (CX 2-14). In December 1999, the claimant reported occasional pain and swelling. (CX 2-16). In June 2000, he had very mild effusion and his quads were "beginning to return" and pain gradually decreasing. (CX 2-17). In December 2000, his right quadriceps showed atrophy. In June 2001, he continued to have pain and difficulty with the right knee. (CX 2-19).

*Physician Opinions*

Dr. Thomas M. Stiles has been board-certified in orthopedic surgery since 1965. (CX 1). He first examined the claimant on February 11, 1997. (Dep. 5). He initially treated him "conservatively" supplying a knee brace, anti-inflammatory medicine, and work restrictions. (Dep. 6). The knee did not improve much and an MRI showed some damage to the end of his bone, but no cartilage tear. (Dep. 6). Arthroscopic surgery was performed revealing an area of contusion to the end of his medial femoral condyle "where he had split off a piece of the covering cartilage on the end of the femoral condyle. That was removed. (Dep. 6). He developed infection post-operatively and was placed on antibiotics. He underwent physical therapy, as well. Mr. Alexander continued to have recurrent swelling, difficulty with certain activities, and pain and occasional giving-way of his knee. (Dep. 6). On March 1, 1999, Dr. Stiles assessed a 30 percent disability rating of the right lower extremity. (Dep. 7).

The 30% impairment rating was based on the fact Mr. Alexander had a certain amount of loss of the cartilaginous space as seen on X-ray and had lost the ability to do certain activities, particularly any type of sports. However, Dr. Stiles testified he did not have a record of exactly how he attributed each of the components in the 30% rating. (Dep. 16). He "probably" relied on the *AMA Guides*. (Dep. 16). The loss of cartilage space is one of the *AMA Guides* parameters. (Dep. 13). He had only 2 millimeters space left in the knee compartments when he should have had about 4 mm. (Dep. 13). Cartilage will regenerate after an injury only for about six to eight weeks. (Dep. 13). Thus, by the time of the 1999 X-ray, it had recovered as much as it would. (Dep. 13). Moreover, he could not run, squat, or kneel. He lost the ability to return to work which required kneeling or knee strain. (Dep. 7). The infection damages surfaces inside the joint so one gets "some softening of those cartilaginous surfaces and they really never recover to be the surfaces they were before; so they won't stand up to long-term wear, and they are easy to irritate and easy to cause swelling and catching and pain in the knee." (Dep. 7-8). Moreover, he lost some muscle mass in his quadriceps–his thigh and leg. (Dep. 8). The *AMA Guides* rate impairment solely on X-ray analysis and do not consider surgical removal of pieces of his knee cartilage. That does not grow back and results in an uneven surface "that's never going to articulate properly. (Dep. 19). Thus, Dr. Stiles would factor that into his rating. (Dep. 18-19).

Dr. Stiles saw Mr. Alexander seven times since May 2002. (Dep. 9). He noted the claimant reported that although he had to give up sports and cannot run or jump, he occasionally jogs a very short distance. (CX 1-28). He continues to suffer knee pain from time to time, his activities cause swelling upon trying any type of sports, he remains on anti-inflammatory medication and continues physical therapy. (Dep. 9). Dr. Stiles opined his condition has stabilized since March 1999 and been "about the same" since then. (Dep. 9). The permanent work restrictions Dr. Stiles assigned in August 18, 1999, remain in effect. (Dep. 10). He expects no further surgery unless the knee deteriorates. (Dep. 10). What he is looking at now is anti-inflammatories and limited activities. (Dep. 11).

*Operative Report*

Dr. Stiles performed arthroscopic surgery on the claimant's right knee on May 22, 1997. He prepared an operative report. (EX 4b). The post-operative diagnosis was:

1. Synovitis, anterior aspect of the right knee.
2. Chondromalacia of the anterior aspect of the right knee.
3. Condylar fracture, anterior aspect of the right knee.
4. Synovitis in the fat pad area beneath the patellar tendon.
5. Area of the Condylar fracturing of the medial femoral condyle, along the weight bearing surface.

*Permanent Work Restrictions*

The claimant's permanent work restriction, issued by Dr. Stiles, on August 19, 1999, include: no lifting over 20 pounds; no carrying 20 lbs more than 15 feet; no ladder climbing; climbing stairs only to job site; no crawling; no kneeling; no squatting; occasional right foot controls. (CX 1-27). There are no driving restrictions; no standing restrictions; and no bending or twisting restrictions.

## C. EMPLOYER'S MEDICAL EVIDENCE

*Physician Opinions*

Dr. Peter S. Apostoles is board-eligible in orthopaedic surgery and has been a physician since 1989. (CX 3-1). He failed the oral portion of the boards once. (EX 4; CX 4; Dep. 24). He no longer does surgery so has not further pursued certification. He has been the employer's staff physician or medical director since 2000. (Dep. 22). He examined the claimant on April 15, 2002. (Dep. 6). He also reviewed Dr. Stile's office notes and rating as well as Dr. Baddar's rating. He examined the girth of Mr. Alexander's quadriceps for atrophy, range of motion, strength, measured for any instability of his ligamentous exam, performed a neurological examination, and also an X-ray. (Dep. 7). He found no significant atrophy–the difference between legs was less than a centimeter. (Dep. 8). Mr. Alexander had full range of motion, a negative McMurray test, stable ligamentous exam, no effusion and the leg was not warm to the touch. (Dep. 8).

Dr. Apostoles referred to the 5th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. He read the claimant's 1999 X-rays and his April 15, 2002 X-ray. (Dep. 9). He found there was no difference between them for rating purposes. The *Guides* permit ratings based on decreased joint space, muscle atrophy, and ligament discrepancy. "There are multiple things that you can rate on." (Dep. 9). Dr. Apostoles measured the joint space. (Dep. 9). Based on the X-ray, finding joint spaces of 3-5 mm, the claimant was entitled to a 7 % lower extremity rating, based on the narrowest space, i.e., 3 mm. (Dep. 12). One may not combine

muscle atrophy and X-ray changes in reaching an impairment figure; the individual is entitled to the highest rating under the *Guides*, Table 17-2. (Dep. 10). Based on Table 17-31, one takes the most narrow cartilage interval and that yields a corresponding rating. (Dep. 11). Dr. Apostoles testified that, " I gave him an additional three percent because of his Staph infection. . ." (Dep. 12-13). Looking at the April 2002 X-ray, he observed no joint space narrowing in the patella femoral, unlike Dr. Stiles. (Dep. 14). According to the *AMA Guides*, there is no compensable joint space narrowing until one has a 2 mm gap which the X-rays did not show. (Dep. 14).

Dr. Apostoles testified that if one follows the *AMA Guides* it is not appropriate to consider inability to do sports or a former job, or wasting of quadriceps, in making a disability rating. (Dep. 16). He agreed the consideration of the staph infection consequences is subjective and that the claimant did not have a smooth recovery. (Dep. 17). He agreed with Dr. Baddar's disability rating, but not the method used to obtain it. (Dep. 19). Dr. Baddar based it on an erroneous finding of a patella fracture. (Dep. 19).

Dr. Apostoles did not refer to the lack of atrophy in his report since there was no significant side-to-side difference. (Dep. 26). He agreed if Dr. Stiles had added five or ten percent for the staph infection, that would not be wrong. (Dep. 28). He likewise arbitrarily assigned three percent.

Dr. Apostoles submitted a report, dated April 15, 2002. (EX 1). The substance of the report was thoroughly covered in Dr. Apostoles' deposition testimony. However, the report reflects no compensable cartilage loss in the claimant's medial femoral joint. He mentioned he used the Combined Values Chart in the *AMA Guides* to find the 10 % impairment.

## IV. CONCLUSIONS OF LAW

An injured person must satisfy four elements in order to receive compensation under the LHWCA. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS 96 (CRT) (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. 33 U.S.C. § 902(4). Third, the injured person must have "status," that is, be engaged in maritime employment. 33 U.S.C. § 902(3); *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 317, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a).

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple*

*A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

It has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

## INJURY

In this case, the parties have stipulated that a work-related injury occurred on June 7, 1996, within the course and scope of the claimant's employment with Newport News Shipbuilding & Dry Dock Company. Thus, the issue to be addressed is the nature and extent of the claimant's disability.

## DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.[3] 33 U.S.C. § 902(10); *see also, Metro Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id*. at 1266).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); and, *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *Lentz v. Cottman Co.*, 852

[3] A disability determination turns on the claimant's capacity for work rather than her actual employment status. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Newport news Shipbuilding and Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported).

F.2d 129, 131 (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). Here, it is undisputed the claimant has been productively employed since August 5, 1998.

NATURE AND EXTENT OF DISABILITY

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI."[4] *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996); *Director, OWCP, v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id*.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F. 3d 122 (5th Cir. 1994)(doctor said nothing further could be done); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician.[5] *See Steig v. Lockheed Shipbuilding & Construction Co.*, 3 BRBS 439, 441 (1976).

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[4] If a claimant shows he is disabled under the Act and MMI has not been reached, the appropriate remedy is an award of temporary total or partial disability, under Section 8(b) or (e). *Carlisle v. Bunge Corp.*, 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *n. 10, citing* 33 U.S.C. § 908(b) and *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

[5] In *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997), the Board found it proper to credit a physician's opinion setting an MMI date after issuance of ALJ's decision based on the normal healing period following knee surgery and not merely on the eventuality the condition may further improve in the future.

Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom., Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986), *pet. dismissed sub nom., Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Permanent disability has been found where little hope exists of eventual recovery, *Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone.[6] *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978); *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. *Bell, supra. See also Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Swan v. George Hyman Construction Corp.*, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability. *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979); *Perry v. Stan Flowers Company*, 8 BRBS 533 (1978).

An employee is considered permanently disabled if he has any residual disability after

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[6] Claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award notwithstanding considerable evidence the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (5th Cir. 1991).

reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978). The Board has held that an irreversible medical condition is permanent *per se. Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979).

Dr. Stiles determined that the claimant's condition stabilized in March 1999 and has been "about the same" since then. (Dep. 9). He did not anticipate the need for further surgery, unless the right knee deteriorated. There is no evidence to contradict Dr. Stile's opinion with respect to the date of MMI. Thus, I find March 1, 1999, as the date of MMI when the claimant's impairment became permanent.

The parties do not dispute that the claimant is entitled to permanent partial[7] disability benefits. The compensation formula in section 8(c)(19) states, "[C]ompensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." The scheduled permanent partial disability rates established by section 8(c)(19) is merely the minimum level of compensation to which the injured employee is entitled. Economic factors are not taken into account in determining benefits for a scheduled injury, such as the injury here. However, the parties do dispute whether it should be the 10 percent found by Dr. Apostoles, the employer's clinic physician versus the 30 percent found by Dr. Thomas Stiles, the claimant's treating physician.

Neither physician has any stated qualifications for reading X-rays. I find Dr. Stiles' opinion entitled to more weight since he is board-certified and Dr. Apostoles is not. Moreover, Dr. Stiles has over thirty years experience in orthopeadics and currently maintains a surgical practice. Dr. Stiles was the claimant's treating physician for a number of years and actually performed his right knee surgery. Dr. Stiles found a 2 mm interval in the claimant's medial femoral and medial tibial femoral. He testified how the loss of cartilage from the knee means it will never articulate properly. As late as December 2000, he found some degree of atrophy in the

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[7] One with a scheduled injury is presumed to be disabled even though the injury does not actually affect his earnings. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (July 17, 2001) citing *Bath Iron Works Corp.*, 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619, 26 BRBS 151(CRT). In contrast, for non-schedule injuries, loss of wage-earning capacity is an element of the claimant's case.

right leg versus the left. Four years after the injury the claimant continues to experience pain and or discomfort in his right knee.

Dr. Apostoles examined the claimant once. His credentials and experience do not match Dr. Stiles'. Unlike Dr. Stiles, he did not find any narrowing in the patella femoral and no significant atrophy. Moreover, he made an educated guess as to the degree of impairment (3%) resulting from the claimant's staph infection. Although he said he found no atrophy, he failed to note that in his initial report. He did correctly find that, under the *Guides*, one may not combine atrophy and space narrowing in determining impairment ratings. However, I find Dr. Stiles' opinion more credible.

Since Dr. Stiles found a 2mm cartilage interval narrowing, as set forth above, Table 17-31, Chapter 17, of the AMA Guides, provides a 20 percent impairment rating of the lower extremity. I do not find a basis to add in additional disability based upon the resolved staph infection since both physicians only made educated guesses to add an additional percentage of impairment.

## COMPENSATION FORMULAE[8]

Section 8 of the Act, identifies four different categories of disability and sets forth the scheme for the payment of compensation for disability for each. Section 8(a) deals with permanent total disability. Section 8(b) deals with temporary total disability. Section 8(c), dealing with permanent partial disability, covers twenty different specific injuries and an additional provision which applying to an injury not included within the list of specific injuries. Section 8(d) deals with payment to survivors of certain unpaid employee benefits. Section 8(e) deals with temporary partial disability.[9]

### *Permanent Partial Disability*

In *Potomac Electric Power Co. (PEPCO) v. Director, OWCP*, 101 S.Ct. 509, 449 U.S. 268, 66 L.Ed. 2d 446, 14 BRBS 363 (1980), "the Court clarified the distinction between scheduled injuries, for which the claimant is limited to the compensation provided in the statutory schedule, and injuries outside the schedule for which § 908(c)(21) provides a potentially higher recovery by incorporating economic factors." *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 160(CRT)(4th Cir. 1999).[10]

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[8] Benefits may not be awarded for pain and suffering. *Young v. Todd Pacific Shipyards Corp*., 17 BRBS 201 (1985).

[9] No compensation, except medical benefits, may be paid for the first three days of a disability unless the injury results in disability of more than fourteen days. 33 U.S.C. § 906(a).

[10] When a claimant is compensated for a scheduled injury, under 33 U.S.C. § 908(c)(1-20), he may not thereafter obtain increased compensation for economic factors, such as claimed loss of wage earning capacity. *Rowe, supra*.

## Scheduled Injuries

Scheduled permanent partial disabilities are compensated in accordance with section 8(c)(1)-(20). In cases of permanent partial disability of a listed member, the compensation is 66 2/3 per cent of the AWW for the proportionate number of weeks attributable to the loss of the member, under section 8(c)(1)-(20), regardless of whether earning capacity has been impaired. See *Henry v. George Hyman Construction Co.*, 749 F.2d 65, 17 BRBS 39(CRT)(D.C. Cir. 1984). This is in addition to compensation for temporary total or temporary partial disability, under section 8(b) and (e). The scheduled permanent disability rates are merely the minimum levels of compensation to which the employee is entitled as a result of injury and no proof of actual loss of wage earning capacity is required to receive the amount specified in the schedule for such injury. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. den.*, 350 U.S. 913 (1955); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000 (1979); *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT)(4th Cir. 1999). In awarding compensation for a scheduled permanent partial disability, the judge is not bound by any particular rating formula as to the extent of disability, including the *AMA Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993). *Cotton v. Army & Air Force Exchange Service*, 34 BRBS 88 (2000); *Mazze v. Frank J. Holleran Inc*., 9 BRBS 1053, 1055 (1978); *see also Ortega v. Bethlehem Steel Corp*., 7 BRBS 639 (1978)(Not required to adhere to *AMA Guides for Combined Values*) .[11]

The scheduled award, pursuant to both the Board and Circuit Courts, runs for the proportionate number of weeks attributable to the loss of the member at the full compensation rate of two-thirds of the average weekly wage. *Nash v. Strachan Shipping Co.*, 15 BRBS 386, 391 (1983), *aff'd in relevant part, but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon., en banc*, 782 F.2d 513 (5th Cir. 1986).

Thus, the claimant is entitled to 66 and 2/3 percent of his AWW for the percent of disability times 288 weeks times the percentage of loss, that is 20 percent. Section 8(c)(2) & (19). Thus, he must be further compensated for 57.6 weeks of permanent partial disability, or $ 22,322.88.

## AVERAGE WEEKLY WAGE

The parties have stipulated and I find that the claimant's average weekly wage is

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[11] In *Hodgkinson v. Electric Boat Corp*., 35 BRBS 459 (ALJ)(2001), Judge DiNardi found the Act does not require the use of the *AMA Guides*, the Guides are not scientific and therefore fail the test of *Daubert v. Merrell Dow Paharmaceuticals, Inc*., 509 U.S. 593, 113 S.Ct. 2786, 125 L.Ed 2d 469 (1993), and should not be relied on when the claimant's treating physician disagrees. [The Fifth Edition of the Guides specifically warns it is "not intended to be used for direct estimates of work disability. Impairment percentages derived according to the Guides criteria do not measure work disability. Therefore, it is inappropriate to use the Guides' criteria or ratings to make direct estimates of work disability." It also suggests that, " The impairment evaluation, however is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age and environmental requirements and modifications."

$ 581.33.

## V. CONCLUSIONS

I find that Mr. Alexander is partially and permanently disabled from performing his employment as a welder. He reached MMI and his right knee impairment became permanent on March 1, 1999. He suffers from a 20 percent permanent partial disability of the right knee. However, he was unemployed from January 5, 1998 until August 5, 2001, as he could not return to his regular employment, and was thus entitled to compensation for total disability during that period. The responsible employer/carrier is Newport News Shipbuilding & Dry Dock Company. Mr. Alexander's average weekly wage is $ 581.33. Furthermore, the employer is liable for all reasonable and necessary medical expenses incurred in the treatment of the claimant's total and permanent disability.

## VI. ATTORNEY'S FEES AND COSTS

Thirty (30) days is hereby allowed to the claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the partes, including the claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

## ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award may be administratively corrected by the District Director.

It is therefore ORDERED that:

1. . Since I found March 1, 1999, as the date of MMI when the claimant's impairment became permanent, his rating for the period from January 5, 1998 through March 1, 1999 should have been listed as temporary total disability and thereafter permanent total disability until August 5, 2001, when he resumed working. However, the employer appropriately paid compensation for temporary total disability during that period during which Mr. Alexander was unemployed. Thus, no adjustment is required.

2. The employer, shall pay to the claimant compensation for his 20 percent permanent partial disability of the right knee, based upon his average weekly wage of $ 581.33, such compensation to be computed in accordance with section 8(c)(19) of the Act. Thus, effective 8/6/01, he must be compensated for 57.6 weeks of permanent partial disability, at $ 387.55 per week or $ 22,322.88.

3. Pursuant to § 7 of the Act, the employer shall furnish such reasonable, appropriate and

necessary medical care and treatment as the claimant's work-related injury referenced herein may require, subject to the provisions of section 7 of the Act.

4. The claimant is entitled to the payments which should have been made by the employer, as set forth in the stipulation (ALJ I, attached LS-208, dated 11/21/01). Since he is entitled to $ 22,322.88, in permanent partial disability payments, and was paid $ 2439.08, in temporary partial disability for the 14-week period of 8/6/01 through 11/11/01, he is thus entitled to the balance of $ 19,883.80.

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RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..